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No. 03-1691

In the Supreme Court of the United States

ROBERT W. LEE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment permits law enforcement officials to monitor and record conversations between a suspect and an informant in a hotel room rented by the informant, but occupied by the suspect, by means of a fixed camera and microphone placed and used with the informant's consent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	7
Katz v. *United States*, 389 U.S. 347 (1967)	13
Kyllo v. *United States*, 533 U.S. 27 (2001)	12
Lopez v. *United States*, 373 U.S. 427 (1963)	9, 10, 11, 12, 13
On Lee v. *United States*, 343 U.S. 747 (1952)	9, 10
United States v. *Caceres*, 440 U.S. 741 (1979)	5, 11
United States v. *Corona-Chavez*, 328 F.3d 974 (8th Cir. 2003)	15
United States v. *Davis*, 326 F.3d 361 (2d Cir.), cert. denied, 124 S. Ct. 281 (2003)	14
United States v. *Hoffa*, 385 U.S. 293 (1966)	5, 10
United States v. *Karo*, 468 U.S. 705 (1984)	16
United States v. *Laetividal-Gonzalez*, 939 F.2d 1455 (11th Cir. 1991), cert. denied, 503 U.S. 912 (1992)	13, 14
United States v. *McKneely*, 69 F.3d 1067 (10th Cir. 1995)	15
United States v. *Modarressi*, 690 F. Supp. 87 (D. Mass. 1988)	16
United States v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983)	14
United States v. *Nerber*, 222 F.3d 597 (9th Cir. 2000)	14, 15

Cases: Page

United States v. *Padilla*, 520 F.2d 526 (1st Cir. 1975) 7, 15
United States v. *Payner*, 447 U.S. 727 (1980) 15
United States v. *Shryock*, 342 F.3d 948 (9th Cir. 2003), cert. denied, 124 S. Ct. 1729 and 1736 (2004) 15
United States v. *White*, 401 U.S. 745 (1971) 10-11
United States v. *Yang*, 281 F.3d 534 (6th Cir. 2002), cert. denied, 537 U.S. 1170 (2003) 15
United States v. *Yonn*, 702 F.2d 1341 (11th Cir.), cert. denied, 464 U.S. 917 (1983) 13, 16

Constitution and statutes:

U.S. Const. Amend. IV 5, 7, 8, 9, 10, 11, 12, 13, 16
18 U.S.C. 1952(a) 2
18 U.S.C. 1956(h) 2
26 U.S.C. 7206 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 359 F.3d 194. The district court's bench opinion denying petitioner's motion to suppress (Pet. App. 67a-85a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2004. A petition for rehearing was denied on March 23, 2004 (Pet. App. 86a-87a). The petition for a writ of certiorari was filed on June 21, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of one count of conspiracy to engage in money laundering, in violation of 18 U.S.C. 1956(h); three counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a); and two counts of filing false tax returns, in violation of 26 U.S.C. 7206. He was sentenced to 22 months of imprisonment on each count, to be served concurrently, and was fined $25,000. The court of appeals affirmed. Pet. App. 1a-66a.

1. The International Boxing Foundation (IBF) is one of the major sanctioning bodies for the sport of boxing. Like other such bodies, the IBF crowns world champions in various weight divisions. Each month, the IBF publishes ratings of boxers in each weight division; those ratings are used to determine which boxers will fight in IBF championship bouts. Petitioner was co-founder and president of the IBF. In that capacity, he served on the IBF executive board and on various IBF committees, including the championship committee (which sanctions IBF championship bouts) and the ratings committee (which publishes the IBF's ratings). Pet. App. 3a.

In 1996, the Federal Bureau of Investigation (FBI) received information that boxing promoters were bribing IBF officials in order to obtain more favorable ratings for their boxers. After being questioned about his involvement, the chairman of the IBF ratings committee, C. Douglas Beavers, agreed to cooperate with the FBI as a confidential informant in the ongoing investigation. Beavers admitted that he had solicited and received bribes from boxing promoters and that the bribes had been divided equally among himself; peti-

tioner; Don "Bill" Brennan, the chairman of the IBF championship committee; and petitioner's son, Robert W. Lee, Jr. Beavers testified that he talked regularly with petitioner about strategies for maximizing the amounts of these bribes and about methods for laundering bribes that were received in the form of checks. Beavers implicated a number of leading boxing promoters in the scandal, including Don King and Bob Arum. Pet. App. 3a-4a; Gov't C.A. Br. 6-11.

With Beavers's cooperation, the FBI monitored three meetings between Beavers and petitioner that took place in Portsmouth, Virginia, from June 1997 to October 1998. The first two meetings were held in a hotel suite rented by Beavers for petitioner at the Portsmouth Holiday Inn; the third was held in a conference room at the same hotel. In order to monitor and record the meetings, the FBI installed, with Beavers's consent, a hidden camera and microphone in the room in which each meeting occurred. The camera and microphone transmitted video and audio signals to an adjacent room. The FBI agent who operated the equipment testified that she switched on the monitor and recorder only when Beavers was in the room. For at least one of the meetings, Beavers also wore a microphone on his body, which apparently malfunctioned. During the second meeting, Beavers handed petitioner cash representing his share of a bribe paid by a Colombian boxing promoter to the IBF's South American representative, Francisco "Pancho" Fernandez; during the third meeting, petitioner handed Beavers and Brennan their shares of a bribe paid by King, and Beavers gave petitioner and Brennan their shares of a bribe paid by another Colombian boxing manager. Pet. App. 3a-4a, 31a, 71a; Gov't C.A. Br. 7-8.

2. On November 4, 1999, a federal grand jury in the District of New Jersey indicted petitioner, Brennan, Lee, Jr., and Fernandez on various counts relating to the receipt of these and other bribes. Pet. App. 5a. Before trial, petitioner moved to suppress the video and audio recordings of the meetings at the hotel. The district court denied the motion. *Id.* at 67a-85a.

The district court first held that the recordings from the third meeting were admissible because petitioner had no "actual or reasonable expectation of privacy" in the conference room in which the meeting occurred. Pet. App. 70a. The court then held that the recordings from the first and second meetings were likewise admissible. *Id.* at 70a-85a. The court found that Beavers had consented to the use of the monitoring devices. *Id.* at 71a. The court also observed that the FBI agent had taken reasonable safeguards to ensure that the devices were used to record "only events in which Mr. Beavers personally participated": that is, "event[s] which he himself could have seen and heard, although his line of vision would have been different from the angle of the camera." *Ibid.* Although the court determined that "[t]here were instances in the course of the monitoring where perfection was not achieved," the court found that these instances were "certainly not prevalent," *ibid.*, and that the precautions taken by the agent were "sufficiently effective," *id.* at 72a. The court noted that the government had volunteered to edit from the recordings any visual images that may have occurred at times when Beavers could not see petitioner. *Ibid.* After reviewing decisions from other courts on the use of fixed monitoring or recording devices, the court concluded that "there is not a meaningful distinction of constitutional dimension between a body wire and fixed location video and audio recording equipment where a

voluntary conversation [between suspect and informant] takes place." *Id.* at 83a.

After a jury trial, petitioner was convicted of one count of conspiracy to engage in money laundering, three counts of interstate travel in aid of racketeering, and two counts of filing false tax returns. Pet. App. 2a.[1]

3. The court of appeals affirmed. Pet. App. 1a-66a.

a. The court of appeals reasoned that petitioner's challenge to the admission of the recordings was "inconsistent with well-established Fourth Amendment precedent concerning the electronic monitoring of conversations with the consent of a participant." Pet. App. 5a. The court noted that, in *United States* v. *Hoffa*, 385 U.S. 293 (1966), this Court had held that a defendant has no protected interest under the Fourth Amendment in a conversation with an informant, even when the conversation occurs in a hotel room, and that, in *United States* v. *Caceres*, 440 U.S. 741 (1979), this Court had indicated that the result would be no different if the informant either recorded the conversation directly or carried radio equipment that transmitted the conversation for monitoring or recording elsewhere. Pet. App. 5a-6a. The court reasoned that those cases together stood for the proposition that, "if a person consents to the presence at a meeting of another person who is willing to reveal what occurred, the Fourth Amendment permits the government to obtain and use the best available proof of what the latter person could have testified about." *Id.* at 7a. "This principle," the

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[1] Petitioner was acquitted on various other counts. The charges against Brennan were dismissed because of his ill health and age; Lee, Jr., was acquitted on all counts; and Fernandez remains a fugitive outside the United States. Pet. App. 5a.

court concluded, "appears to doom [petitioner's] argument here." *Ibid.*

The court of appeals then rejected petitioner's attempt to distinguish those cases based on three factors: (i) that the agents used video, rather than merely audio, equipment; (ii) that some of the recordings occurred in petitioner's hotel room, a place in which a person has a heightened expectation of privacy; and (iii) that the monitoring equipment remained in the room when the informant was not present. Pet. App. 7a, 9a-11a. As to the first factor, the court reasoned that, "just as [petitioner] gave up any expectation of privacy in the things that he allowed Beavers to hear, [petitioner] also gave up any expectation of privacy in the things that he allowed Beavers to see." *Id.* at 10a. Although the court conceded that "video surveillance may involve a greater intrusion on privacy than audio surveillance," it noted that "the difference is not nearly as great as the difference between testimony about a conversation and audio recordings of conversations"—a distinction that this Court had not found to be constitutionally relevant. *Ibid.* As to the second factor, the court reasoned that "[w]hat is significant is not the type of room in which the surveillance occurred but [petitioner's] action in admitting Beavers to the room." *Id.* at 9a. The court observed that, in *Hoffa*, many of the conversations at issue had similarly occurred in a hotel room. *Id.* at 9a-10a. As to the third factor, the court reasoned that the mere fact that "the recording device was placed in the room rather than on the [informant's] person" was not constitutionally significant, provided that the defendant had no expectation of privacy in the premises at the time the device was installed (and the entry to install the device thus did not constitute a search); recordings were not made when the informant was not present;

and the recording device was placed in such a way that it could not pick up things that the informant could not have seen or heard while in the room. *Id.* at 10a-11a. Where, as here, none of those circumstances was present, "the recording will not gather any evidence other than that about which the cooperating witness could have testified." *Id.* at 11a.

Finally, the court of appeals rejected the reasoning of *United States* v. *Padilla*, 520 F.2d 526 (1st Cir. 1975), the principal authority on which petitioner had relied. Pet. App. 7a-9a, 11a-13a. At the outset, the court noted that "*Padilla* was decided more than a quarter century ago and has not been followed in any other circuit." *Id.* at 11a. The court reasoned that "the decision in *Padilla* appears to be based, not on the conclusion that the recordings in that case had been obtained in violation of the Fourth Amendment, but on a prophylactic rule designed to stamp out a law enforcement technique that the [c]ourt viewed as creating an unacceptable risk of abuse." *Ibid.* The court expressed doubt that it had the authority to adopt such a rule. *Ibid.* The court proceeded to reject the proposition that allowing officers to use fixed monitoring devices would lead to a substantial risk of abuse. *Id.* at 11a-12a. First, it would violate the Fourth Amendment and federal statutes for officers to monitor conversations that did not involve informants, and a federal officer engaging in such conduct could be sued pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 12a. Second, in order to install a monitoring device, officers would first need to obtain the right to enter the premises, thereby rendering the fear that agents could place devices in a person's home "misplaced." *Ibid.* Third, officers would have little to gain by monitoring conversations that did not involve

informants, since those conversations would be inadmissible. *Ibid.* Because "[t]here is no evidence that conversations were monitored when Beavers was absent from the room," and because "the tapes do not depict anything material that Beavers himself was not in a position to hear or see while in the room," the court concluded that petitioner's Fourth Amendment rights had not been violated. *Id.* at 12a-13a.[2]

b. Judge McKee dissented. Pet. App. 30a-66a. He rejected the majority's conclusion that the government took sufficient steps to ensure petitioner's privacy, reasoning that "[the FBI agent] had the ability to manipulate a video camera to see and hear practically everything that [petitioner] did in the privacy of his hotel suite throughout the day and night." *Id.* at 38a. According to Judge McKee, because the limitations on the use of the devices "were defined by the curiosity and scruples of a single agent," they were insufficient to safeguard Fourth Amendment rights. *Id.* at 39a. Judge McKee reasoned that petitioner retained a legitimate expectation of privacy in anything inside the room that he did not knowingly let Beavers see. *Id.* at 42a. He noted that the government had conceded that the camera transmitted video images at times when Beavers could not see petitioner. *Id.* at 45a. Judge McKee then asserted that video surveillance was more intrusive than audio surveillance. *Id.* at 45a-46a. He contended that a fixed video camera inherently acquires visual information that differs from what is seen by an informant. *Id.* at 47a-49a. Finally, Judge McKee suggested that allowing officers to use fixed monitoring

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[2] The court of appeals also rejected petitioner's numerous other challenges to his conviction and sentence. Pet. App. 13a-29a. None of those holdings is challenged in the petition.

devices would lead to a substantial risk of abuse. *Id.* at 57a-63a.

ARGUMENT

Petitioner contends (Pet. 7-14) that the Fourth Amendment prohibited law enforcement officials from monitoring or recording his conversations with an informant in a hotel room by means of a fixed camera and microphone placed and used with the informant's consent. The court of appeals' decision upholding the recording does not conflict with this Court's decisions, and presents no conflict with any decision of another court of appeals that warrants further review at this time.

1. The court of appeals' decision is consistent with an unbroken line of decisions from this Court concerning the acquisition of evidence from conversations between a suspect and an informant.

a. This Court has repeatedly upheld the monitoring or recording of conversations between a suspect and an informant, provided that the monitoring or recording is conducted with the informant's consent. In *On Lee* v. *United States*, 343 U.S. 747 (1952), an informant wearing a microphone and transmitter entered the suspect's workplace and engaged the suspect in conversation, in the course of which the suspect made incriminating statements. *Id.* at 749. The Court upheld the admission of the testimony of an agent who listened to the conversation over a remote receiver. *Id.* at 749-750, 753-754. In *Lopez* v. *United States*, 373 U.S. 427 (1963), the Court reached the same conclusion in a case in which an undercover federal agent was wearing a recording device instead of a transmitter. *Id.* at 430. The Court reasoned that "[t]he Government did not use an electronic device to listen in on conversations it

could not otherwise have heard," but instead used the device only "to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." *Id.* at 439. The Court concluded that the suspect had assumed the risk that the conversation "would be accurately reproduced in court, whether by faultless memory or mechanical recording." *Ibid.*

Similarly, this Court has held that an informant can testify concerning conversations between the informant and a suspect, even if the conversations occurred in a place in which the suspect would otherwise have a heightened expectation of privacy for Fourth Amendment purposes. In *Hoffa* v. *United States*, 385 U.S. 293 (1966), an informant testified about conversations occurring in, among other places, the suspect's hotel room. *Id.* at 296. Although the Court conceded that "[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office," *id.* at 301, it reasoned that the Fourth Amendment protected only "the security a man relies upon when he places himself or his property within a constitutionally protected area," *ibid.* Because the informant was invited into the suspect's hotel room, the suspect "was not relying on the security of the hotel room; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing." *Id.* at 302.

Finally, combining the holdings of *On Lee* and *Lopez* with that of *Hoffa*, this Court has upheld the consensual monitoring or recording of conversations between a suspect and an informant, even if the conversations occurred in a place in which the suspect would otherwise have a heightened expectation of privacy. In *United States* v. *White*, 401 U.S. 745 (1971), an informant wear-

ing a microphone and transmitter engaged in several conversations with the suspect, some of which occurred in the suspect's home and car. *Id.* at 746-747. A plurality of four Justices reasoned that, under *Hoffa*, "a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them" without violating a suspect's Fourth Amendment rights. *Id.* at 751. Citing *Lopez* and *On Lee*, the plurality asserted that "no different result is required if the agent[,] instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, (2) or carries radio equipment which simultaneously transmits the conversations." *Ibid.* (citation omitted).[3] A majority of the Court subsequently embraced the reasoning of the plurality opinion in *White*, quoting at length from that opinion in concluding that the monitoring and recording of conversations between a suspect and an undercover agent were constitutional. See *United States* v. *Caceres*, 440 U.S. 741, 750-751 (1979).

b. The FBI's use of video, as well as audio, equipment to monitor and record the conversations at issue here does not alter the constitutional analysis. In *Lopez*, the Court expressly sanctioned the use of electronic recording devices to obtain the "most reliable evidence" of the underlying conversation, without differentiating between types of devices. 373 U.S. at 439. At least where, as here, there is no claim that the equipment is so sophisticated as to enable officers to

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[3] Justices Black and Brennan concurred on different grounds. See *White*, 401 U.S. at 754 (Black, J., concurring in the judgment); *id.* at 755 (Brennan, J., concurring in the result).

collect information that the informant could not have collected by means of his own senses (or generally available technology), the use of such equipment does not present any Fourth Amendment concerns. Cf. *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001) (holding that using sense-enhancing technology to obtain information about the interior of a home constitutes a search when "the technology in question is not in general public use").

Similarly, the fact that the devices were placed in a fixed location, rather than on the informant's body, also does not affect the constitutional analysis in these circumstances. Although the initial *placement* of monitoring or recording devices in a suspect's home could itself constitute a search and thus require a warrant, see, *e.g.*, *Lopez*, 373 U.S. at 439, the devices at issue here were installed in a hotel room being rented by the informant with the informant's consent. Of critical importance, the devices were used only when the informant was in the room, and did not record "anything material that [the informant] himself was not in a position to hear or see while in the room." Pet. App. 13a.[4] Accordingly, because "the recording [did] not gather any evidence other than that about which the [informant] could have testified," *id.* at 11a, the use of fixed devices here ensured only that the conversation between the suspect and informant "would be accurately reproduced in

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[4] Petitioner notes (Pet. 4-6) that the informant, Beavers, was in the bathroom during a telephone conversation between petitioner and his son. Evidence in the record, however, suggests that Beavers was able to overhear petitioner during that conversation (even if Beavers was unable directly to see him). Pet. App. 71a-72a, 84a. Moreover, the government offered to delete from the video recording any images that may have occurred at times when Beavers could not see petitioner. *Id.* at 72a.

court," *Lopez*, 373 U.S. at 439, and therefore did not violate the Fourth Amendment.[5]

2. a. The court of appeals' decision is also consistent with almost all of the decisions of other courts of appeals involving the same or similar factual circumstances. Most notably, the Eleventh Circuit upheld the use of an audio monitoring device, installed in a motel room rented by the informant with the informant's consent, that was activated only when the informant was present in the room. *United States* v. *Yonn*, 702 F.2d 1341, 1346-1347, cert. denied, 464 U.S. 917 (1983). The court specifically rejected the suspect's effort to draw a "constitutional distinction which depends upon the location of the recording apparatus." *Id.* at 1347. The court reasoned that "[t]he location of the electronic equipment does not alter the irrefutable fact that [the suspect] had no justifiable expectation of privacy in his conversation with [the informant]." *Ibid.* The Eleventh Circuit subsequently extended that rule to a case in which video monitoring equipment was installed in an office rented by an informant. *United States* v. *Laetividal-Gonzalez*, 939 F.2d 1455, 1460 (1991), cert. denied, 503 U.S. 912 (1992). Citing *Yonn*, the court rejected any distinction between video and audio monitoring, reasoning that "a defendant has no justifiable expectation of privacy when he speaks with someone acting as a government informant, and is unaware that

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[5] Petitioner contends (Pet. 7, 13-14) that the court of appeals' decision conflicts with this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967). In *Katz*, however, the Court left "undisturbed" its earlier decisions in *On Lee*, *Lopez*, and *Hoffa*. *Id.* at 363 n.* (White, J., concurring). Moreover, the Court reiterated the general principle that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351.

a recording device is concealed in the room." *Id.* at 1460-1461.

Likewise, the Second Circuit has twice upheld the use of video equipment to monitor conversations between suspects and informants. In *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983), the court summarily rejected a challenge to the use of what was apparently fixed video equipment at a government-maintained townhouse, reasoning that "[the suspect's] conversations with undercover agents in whom he chose to confide were not privileged, and mechanical recordings of the sights and sounds to which the agents could have testified were proper evidence." *Id.* at 859. More recently, in *United States* v. *Davis*, 326 F.3d 361, cert. denied, 124 S. Ct. 281 (2003), the Second Circuit upheld the use of video and audio equipment that had been concealed in the informant's jacket. *Id.* at 363. The court reasoned that "[the informant] was inside [the suspect's home] with [the suspect's] consent and the hidden camera merely memorialized what [the informant] was able to see as an invited guest." *Id.* at 366.

Finally, and contrary to petitioner's suggestion (Pet. 9, 11-12), the Ninth Circuit has also sanctioned the use of video equipment to monitor conversations between suspects and informants in similar circumstances. In *United States* v. *Nerber*, 222 F.3d 597 (9th Cir. 2000), the court reasoned that suspects had no objectively reasonable expectation of privacy that they would be free from hidden video surveillance while informants were present in a hotel room that had been rented by the government. *Id.* at 604. The court, however, ultimately affirmed the suppression of the fruits of surveillance that occurred *after* the informants left the room. *Id.* at 604-605. The Ninth Circuit later applied

the rule of *Nerber* to uphold the admission of video recordings made in a hotel room rented by the informant, though it left open whether the same rule would apply to recordings of conversations occurring in a hotel room rented by one of the suspects. *United States* v. *Shryock*, 342 F.3d 948, 978-979 (2003), cert. denied, 124 S. Ct. 1729 and 1736 (2004).[6]

b. By contrast, in *United States* v. *Padilla*, 520 F.2d 526 (1975), the First Circuit held that officers could not use fixed audio equipment, installed in a motel room rented by the government, that was activated only when undercover government agents were present in the room. *Id.* at 527. The reasoning of *Padilla* is unsound. In its brief opinion, the First Circuit seemingly concluded that *any* use of a fixed monitoring or recording device was invalid simply because officers *could* use such a device improperly to monitor or record the activities of a suspect even when an informant was not present in the room. See, *e.g.*, *id.* at 528 ("Under this approach a room—or an entire hotel—could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur."). This Court has noted, however, that a court may not use its supervisory powers to suppress otherwise admissible evidence, *United States* v. *Payner*, 447 U.S. 727, 735 (1980), and that it has never held that "potential, as opposed to actual, invasions of privacy

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[6] Other courts of appeals have upheld, albeit without extended discussion, the use of video equipment to record conversations between a suspect and an informant occurring in a hotel room rented and occupied by the informant. See, *e.g.*, *United States* v. *Corona-Chavez*, 328 F.3d 974, 981 (8th Cir. 2003); *United States* v. *Yang*, 281 F.3d 534, 548 (6th Cir. 2002), cert. denied, 537 U.S. 1170 (2003); *United States* v. *McKneely*, 69 F.3d 1067, 1073-1074 (10th Cir. 1995).

constitute searches for purposes of the Fourth Amendment," *United States* v. *Karo*, 468 U.S. 705, 712 (1984). As another court of appeals has observed, the reasoning of *Padilla* thus sweeps too broadly, because "any judicial sanction of electronic recording creates the potential for unauthorized interceptions." *Yonn*, 702 F.2d at 1347 n.5.

Any conflict between *Padilla* and the court of appeals' decision here does not warrant the Court's review at this time. *Padilla* was decided before (i) this Court's decision in *Caceres*, in which a majority of the Court adopted the portions of the plurality opinion in *White* concluding that officers could engage in the consensual monitoring or recording of conversations between a suspect and an informant, even where the conversations occurred in a place in which the suspect would otherwise have a heightened expectation of privacy; (ii) this Court's decisions in *Payner* and *Karo*, in which the Court reasoned that the mere potential for abuse is not a sufficient basis for finding a Fourth Amendment violation or otherwise excluding evidence; and (iii) all of the other decisions of the courts of appeals discussed above, in which courts upheld the use of monitoring equipment in the same or similar factual circumstances. In the nearly 30 years since *Padilla* was decided, no court of appeals has followed it, and the First Circuit has not so much as cited it. In addition, at least two courts of appeals have directly criticized the rationale of *Padilla*, see Pet. App. 7a-9a, 11a-13a; *Yonn*, 702 F.2d at 1347 n.5, as has one district court within the First Circuit, see *United States* v. *Modarressi*, 690 F. Supp. 87, 92 (D. Mass. 1988). In light of these intervening developments, it is unclear whether the First Circuit would continue to adhere to the reasoning of *Padilla*. Accordingly, unless and until the First Circuit

revisits and reaffirms its decision in *Padilla*, further review based on the other circuits' disagreement with that decision would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 200[illegible]